COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1020-CR **Cir. Ct. Nos. 2009CF496**
2009CF517

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER D. JACOB,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Winnebago County: SCOTT C. WOLDT and BARBARA H. KEY, Judges. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Christopher D. Jacob appeals from two judgments entered upon his pleas of no contest to bail jumping, repeated sexual assault of a

child, and second-degree sexual assault. Jacob further appeals from two orders denying his motion and supplemental motion to vacate his pleas. He argues that the circuit court should have permitted him to withdraw his pleas because his counsel was ineffective by failing to show him recordings and summaries of forensic interviews of the children who alleged he had sexually assaulted them, and he discovered new evidence in the form of a letter from the mother of one of the children offering to influence the children into recanting their original allegations in exchange for payment.[1] We conclude that the circuit court properly denied Jacob's motions and, thus, we affirm the judgments and orders.

¶2 In August 2009, Jacob was charged in two complaints with eight felonies: repeated sexual assault of a child, first-degree sexual assault of another child, and six counts of bail jumping. Jacob entered no contest pleas to repeated sexual assault of a child, second-degree sexual assault of a child, and one count of bail jumping. He was subsequently sentenced.

¶3 Approximately one year later, Jacob moved to vacate his pleas on the ground that his attorney provided ineffective assistance of counsel. Jacob alleged that his counsel did not allow him to see two DVD videos depicting forensic interviews that investigators conducted of the complainants, seven-year-old N.M and eight-year-old C.B, or summaries of those interviews that a prior attorney had prepared and given to counsel. Jacob's attorney advised him to plead no contest even though Jacob had never reviewed the videos or the summaries,

[1] The Honorable Scott C. Woldt entered the judgments of conviction, while the Honorable Barbara H. Key denied Jacob's postconviction motions that followed the ***Machner*** hearing after remand. ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

and counsel gave that advice without first hiring an expert to review the videos.[2] Jacob claimed that the behavior of the children in the videos did not comport with the behavior of persons who had supposedly been sexually assaulted, and had he seen the videos he would not have pleaded no contest but would have insisted on going to trial. Following a hearing at which only counsel testified, the circuit court denied Jacob's motion.

¶4 Jacob appealed, but we reversed and ordered a ***Machner*** hearing. Jacob supplemented his motion with allegations that "no reasonable person [could] view the [C.B.] interview without forming the conclusion that [her] demeanor, expressions, body language, and affect rendered her statements nearly incredible as a matter of law."

¶5 Following the ***Machner*** hearing, the circuit court denied the motion to withdraw Jacob's pleas. In doing so, the court credited counsel's testimony and discredited Jacob's testimony. The court found that considering their age and the circumstances, the children did not behave inappropriately. The children had been placed in a room alone with cameras and so they started making faces to the camera. While, had an adult done this under these circumstances it would have been unusual, it was not so for a child. Further, the court highlighted, Jacob had observed C.B. testify to the same conduct alleged in the complaint and covered in her forensic interview as an other-acts witness in another trial against Jacob. So, Jacob would have been able to assess C.B.'s credibility. Based on the foregoing,

[2] The allegation that counsel should have hired an expert to review the forensic interviews was first raised at the ***Machner*** hearing.

the court held that the videos did not contain exculpatory evidence. Jacob appeals from this order.

¶6 Nearly two years later, while Jacob's appeal was pending, he filed a supplemental postconviction motion to withdraw his pleas based on newly discovered evidence—a letter addressed to Jacob that allegedly was sent by N.M.'s mother stating that in exchange for $20,000 she would take the children to the district attorney's office and have them tell the district attorney that "Dan told them what to say."[3]

¶7 The circuit court held a hearing and, after all the witnesses had testified, Jacob requested a continuance so that the envelope containing the letter could be submitted to the FBI for a handwriting analysis. The court denied the request, noting that the letter was nearly two years old now, and that Jacob had known for nine months in advance of the hearing that the State Crime Laboratory had not performed a handwriting analysis but Jacob did not attempt to conduct any further analysis. The court went on to deny the motion, finding that there was insufficient proof showing who sent the letter and, in any event, the author of the letter did not necessarily say that the children's original allegations were false. Jacob also appeals from this order.

Ineffective Assistance of Counsel

¶8 A defendant bears the burden of showing "by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in manifest injustice." ***State v. Dillard***, 2014 WI 123, ¶83, 358 Wis. 2d 543, 859 N.W.2d 44.

[3] "Dan" is supposedly Jacob's brother.

Ineffective assistance of counsel is one way to show that a manifest injustice has occurred. ***Id.***, ¶84. Ineffective assistance of counsel requires proof that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Proof of deficient performance requires a showing that under the totality of the circumstances, counsel's performance fell "'outside the wide range of professionally competent assistance.'" ***Dillard***, 358 Wis. 2d 543, ¶88 (quoting ***Strickland***, 466 U.S. at 690). Proof of prejudice requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Dillard***, 358 Wis. 2d 543, ¶95 (citation omitted). In the context of a plea, this means that the defendant must show that there is a reasonable probability that he would not have pleaded no contest and would have gone to trial. ***Id.***, ¶96.

¶9 A claim of ineffective assistance of counsel is a question of constitutional fact. ***Id.***, ¶86. Thus, the circuit court's findings of historical fact will be upheld unless clearly erroneous, but whether those facts establish the ineffective assistance of counsel is a question of law that is reviewed independently of the circuit court. ***Id.***

¶10 The circuit court credited the testimony of counsel that he had reviewed the videos and the summaries and discussed their contents with Jacob but had not viewed that evidence with him. Counsel explained that Jacob had watched N.M. testify as an other-acts witness in a different trial, and that Jacob had police reports containing the children's statements that paralleled the videos, which counsel discussed with him; thus, counsel did not think that Jacob needed to see the videos in their entirety with counsel in order to make a decision about

whether to plead or go to trial. While Jacob claimed that counsel said he was legally prohibited from showing the videos to Jacob, the circuit court rejected this testimony. This was not a case, the court said, where a defendant "demanded to see [the evidence] and the defense attorney would not provide it." Indeed, Jacob himself acknowledged that counsel had at least generally discussed the videos, telling him that there "was nothing good" on them. These factual findings are not clearly erroneous. Since the circuit court found that counsel had discussed the content of the videos and the summaries with Jacob, and the substantive allegations were essentially the same, Jacob's claim that his counsel deprived him of necessary information so that his decision to plead no contest was unknowing and unintelligent must fail.[4]

¶11 Ultimately, Jacob's claim is premised on the assertion that because the children were not acting as victims of sexual assault should, they were not credible. But, Jacob's claim is entirely conclusory. It was Jacob's burden to show that the children's behavior during the interviews called their credibility into question, and that counsel's failure to recognize this was deficient performance. However, other than Jacob's say so, no evidence, such as an expert opinion, was offered to show that the children's behavior during the interviews was so unusual that it made them unworthy of belief.

¶12 Like the circuit court, we have reviewed the videos, and, based on this record, we agree with the circuit court's assessment. In an interview of one of the children, when the interviewer is absent from the room for several minutes, the

[4] On appeal, Jacob does not challenge any of the circuit court's credibility conclusions, nor does he develop any challenge to the substance of the children's statements.

child smiles into the camera, which she knew was recording, and starts making funny faces.[5] This child's behavior while alone in a room with only a book "wasn't critical" information, as the circuit court concluded. Rather, as the circuit court said, "nothing … was … inappropriate … with children looking in the camera, making faces to the camera when they had been put in a room by themselves with four walls around them."[6] While there were moments of playfulness, that demeanor was not evident during much of the interview.

¶13 In short, counsel's failure to show these videos to Jacob was not deficient performance and did not prejudice him.

¶14 Jacob also claims that his attorney's lack of experience is relevant in assessing whether he rendered ineffective assistance of counsel. However, "[w]hether or not an attorney is experienced is not the criterion for determining whether counsel was effective in a particular case." ***State v. Felton***, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983). "[I]inexperienced counsel may provide representation which is equal to that that would be given by an ordinarily prudent lawyer skilled and versed in the criminal law and, conversely, on occasions even experienced counsel may be ineffective." ***Id.*** at 500. The question is whether

[5] We discuss only the interview of this child because it is the most noteworthy of Jacob's complaints.

[6] Jacob complains briefly that counsel advised him to plead without hiring an investigator or expert to review the videos. Again, Jacob has not offered anything to show that the children's behavior on the videos was so unusual that it should have been apparent to counsel that he needed to consult with an expert. Just as juries are instructed, the determination of credibility is a matter of "common sense and experience." WIS JI—CRIMINAL 300. Certainly counsel can make an assessment of credibility and does not necessarily have to consult with an expert regarding the children's behavior to make that assessment. Demeanor of a complainant may raise a question of the complainant's credibility, but, where there are two child witnesses making similar allegations of sexual assault, the jury, as counsel testified, could "definite[ly]" believe them.

counsel's performance was competent in a particular case, not whether counsel is generally competent, and nothing Jacob has provided here demonstrates that counsel's performance was deficient. *See* ***id.***

Newly Discovered Evidence

¶15 Next, Jacob asserts that he is entitled to a new trial based on his discovery of new evidence —a letter allegedly written to Jacob by N.M.'s mother.

¶16 "Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The defendant, bearing the burden by clear and convincing evidence, must show that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***Id.*** If the defendant satisfies these criteria, then "the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.***

¶17 Where the newly discovered evidence consists of a witness's recantation, the recantation evidence must be corroborated by a "feasible motive for the initial false statement," and "circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 477-78. This is because "[r]ecantations are inherently unreliable." ***Id.*** at 476.

¶18 Withdrawal of a plea based on newly discovered evidence is committed to the discretion of the circuit court. ***Id.*** at 473. Consequently, the circuit court's determination will not be disturbed unless it erroneously exercised its discretion. ***Id.***

¶19 Implied within the newly discovered evidence requirement that the evidence would have rendered it reasonably probable that a different result would be reached at a new trial is the concept that the evidence is relevant and admissible. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 253, 256, 409 N.W.2d 432 (Ct. App. 1987). In other words, as the State points out, Jacob must show that the evidence is what he claims it to be: a letter sent by N.M.'s mother seeking to extort $20,000 from him in exchange for the children telling the district attorney that "Dan" had told them to lie about the original allegations. However, the circuit court's finding that "[w]e don't know who sent the letter" amounted to a finding that the letter was not what Jacob claimed it to be, that is, that the letter was not "authentic." WIS. STAT. § 909.01 (2015-16) ("The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").[7] N.M.'s mother denied that she authored the letter, testifying at the hearing, "I had nothing to do with that letter."

¶20 The State submitted the typewritten letter and accompanying envelope to the State Crime Laboratory for analysis of fingerprints. The Crime Lab excluded N.M.'s mother as the source of some of the "fraction ridge detail,"

[7] In his main brief, Jacob ignores the circuit court's finding that the letter is not authentic and proceeds to analyze whether the letter meets the criteria of "newly discovered evidence." In his reply brief, seemingly in response to the State's argument that the letter is not authentic, Jacob argues that it was inappropriate for the circuit court to make a determination about the credibility of the letter. However, a circuit court may rightly consider whether evidence is incredible in the context of a newly discovered evidence claim, and saying that evidence is not authentic is a similar way of saying that evidence is not worthy of belief. *See* ***State v. Ferguson***, 2014 WI App 48, ¶30, 354 Wis. 2d 253, 847 N.W.2d 900

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

and found that other fraction ridges lacked sufficient clarity or quality for comparison. The Crime Lab did, however, find another inmate's fingerprints on the letter, and, as the State argues, a reasonable inference from that finding is that that inmate wrote the letter at Jacob's behest.[8] Moreover, the letter is vague and conclusory and is not, as Jacob claims, "replete with circumstantial information that only [N.M.'s mother] could know." Thus, we cannot conclude that the circuit court erred in finding that the letter was not, as Jacob claimed, written by N.M.'s mother.

¶21 To the extent Jacob claims that the circuit court should have granted him a continuance to take an exemplar from N.M.'s mother and have the FBI conduct a handwriting analysis on the envelope containing the letter, the circuit court's decision denying a continuance was not an erroneous exercise of discretion. The circuit court pointed out that Jacob received the Crime Lab's report regarding the letter and envelope soon after June 29, 2015.[9] Jacob was aware of the Crime Lab's results and that it had not conducted a handwriting analysis of the envelope.[10] Yet, as the court noted, despite having "plenty of time to analyze this document"—about eight months between receipt of the Crime Lab's report and the hearing on February 25, 2016—Jacob took no action. Counsel did not even request a continuance until after all the evidence was

[8] Jacob testified that this inmate was in his cell at the time Jacob received the letter and that this inmate handled the letter.

[9] The letter was purportedly sent to Jacob nearly two years earlier.

[10] At the hearing, the analyst who examined the letter and envelope testified that the State Crime Lab no longer had an analyst trained to compare handwriting, that the FBI has that capability, but that the request to have a handwriting analysis would have to come from the agency that submitted the evidence, not the analyst herself.

presented and the court was about to rule. As the circuit court pointed out, it was Jacob's burden to prove that the letter was what he claimed it to be, and he had sufficient time to do so. Given these circumstances, the circuit court's decision denying a continuance was rational and explainable. *See* ***State v. Wright***, 2003 WI App 252, ¶49, 268 Wis. 2d 694, 673 N.W.2d 386.

¶22 Therefore, we affirm the judgments of conviction and orders denying Jacob's motions to withdraw his pleas.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).